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No. 10-1147

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF FOR THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae American Bar Association (ABA) respectfully submits this brief in support of the Petition for a Writ of Certiorari. The ABA requests that this Court resolve the conflict among the courts of appeals with respect to the question presented so as to provide clear and uniform guidance on an issue that is critical to the attorney-client relationship, that being the rules that are to be applied when a grand jury subpoena is served on an attorney for client information.

With nearly 400,000 members, the ABA is the largest voluntary professional membership organization in the United States and the leading organization of the American legal profession. The ABA's members come from each of the 50 states, the District of Columbia, and the U.S. territories. Its voluntary membership includes lawyers in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, judges, law professors, law students, and non-lawyer associates

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk's office. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amicus Curiae*'s intention to file this brief.

in related fields.[2]

The ABA's mission is "to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[3] One of the ABA's goals is to "promote competence, ethical conduct, and professionalism."[4] In furtherance of this goal, the ABA has devoted extensive research and effort to addressing the delicate balance between the public interest and protecting the attorney-client relationship. This work serves the interest of promoting both the rule of law and the right to free and unfettered assistance of counsel.

The ABA first addressed *per se* enforcement of grand jury subpoenas directed to attorneys for client information in February 1986. A policy adopted that year to protect the attorney-client relationship was thereafter revised in 1988, and has remained ABA policy since that time. Believing that the Petition for Writ of Certiorari that is now before the Court presents an issue that is similarly critical to an effective attorney-client relationship, the ABA respectfully requests that the Petition be granted so that lawyers and their clients may be guided by uniform and clear rules.

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA.

[3] ABA Policy and Procedures Handbook 1 (2010-2011).

[4] *Id.*

SUMMARY OF THE ARGUMENT

The Ninth Circuit has adopted a *per se* rule that grand jury subpoenas always take precedence over civil protective orders, even where a prosecutor uses a grand jury's broad investigative subpoena power to compel a lawyer to produce client information. That ruling directly implicates an existing conflict among the circuit courts on an issue of great importance to the legal profession. The question presented moreover has significant potential to affect the trust and confidence that are the essential foundations of the attorney-client relationship.

The ABA has adopted policies against *per se* enforcement of subpoenas because of their potential to undermine the attorney-client relationship. Beyond information protected by the attorney-client privilege, a lawyer is obligated in the attorney-client relationship to maintain a client's confidences except as directed by the client in the course of the representation. The *per se* approach overrides this element of confidence by compelling the lawyer served with a subpoena to act contrary to the interests of the client without an inquiry as to whether the government has other available means for obtaining the information. Thus, clients under grand jury investigation may hold back important information from their lawyers out of fear that their counsel will be compelled to produce to the government information that was disclosed to the lawyer through the attorney-client relationship.

The ABA does not at this time take a position with respect to the merits of the question presented.

But because of the concerns that arise from the chilling effect that the *per se* rule can have on the flow of information between attorney and client, the ABA believes that the rules for enforcing subpoenas against lawyers merit review and elucidation by this Court. This Court's adoption of uniform rules also will ensure that lawyers and their clients will not face different rules in different jurisdictions when a lawyer is confronted with a grand jury subpoena for client information.

REASON FOR GRANTING THE WRIT

Enforcement of Grand Jury Subpoenas Against Attorneys for Client Information Has Important Ramifications for the Attorney-Client Relationship.

This case presents an important question – on which the Circuits have split in at least three directions – that has serious ramifications for the attorney-client relationship. The Ninth Circuit has declared that whenever, "[b]y a chance of litigation," documents that would otherwise be unavailable to the grand jury are "moved from outside the grasp of the grand jury to within its grasp" – because those documents are in a lawyer's hands – "a grand jury subpoena takes precedence over a civil protective order." App. 3a (citation omitted). That rule allows virtually indiscriminate use of grand jury subpoenas to compel lawyers to produce evidence to the government for use in a grand jury investigation of the lawyer's own client.

The ABA first adopted a policy against *per se* enforcement of subpoenas in 1986. Two years later, the ABA's Criminal Justice Section presented the ABA 1988 Midyear Report with Recommendation #122B to the ABA's House of Delegates (hereinafter, 1988 Report with Recommendation) (copy attached as appendix). The Report discussed the increased use of such subpoenas by federal prosecutors following the passage, *inter alia*, of the Comprehensive Crime Control Act's amendments to the federal RICO and Continuing Criminal Enterprise statutes. 1988 Report with Recommendation, Report at 9-11. These subpoenas were directed at information "on the size and source of the attorney's fees," for use in the forfeiture of the fees paid to attorneys. *Id.* at 11.

The ABA House of Delegates, in response, adopted the 1988 Recommendation as policy, and it has been ABA policy since that time.[5] This policy urges that, "where a prosecutor seeks to compel an attorney to provide evidence obtained as a result of the attorney-client relationship ..., the prosecutor shall not subpoena nor cause a subpoena to be issued to the attorney without prior judicial approval after an opportunity for an adversarial proceeding." 1988 Report with Recommendation, Recommendation at 1.

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[5] Recommendations become official ABA policy upon adoption by vote of the ABA House of Delegates, which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the United States Attorney General, among others. *See* ABA General Information, http://www.abanet.org/leadership/delegates.html (last visited April 10, 2011).

The policy also urges that judicial approval be withheld unless the court finds: (i) "the information sought to be produced is not protected by privilege"; (ii) "the evidence ... is essential to the successful completion of an ongoing investigation and prosecution and is not merely peripheral, cumulative or speculative"; (iii) the information is described with particularity and "is directed at information regarding a limited subject matter and a reasonably limited period of time"; (iv) the subpoena is not being used to harass the attorney or client; and (v) "the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information." *Id.* at 1-2.

The ABA's policies were designed to balance protecting the attorney-client relationship from unnecessary intrusion with the legitimate needs of the grand jury for the production of relevant evidence. As stated in the 1988 Report:

> Proper operation of our adversary system of justice requires full recognition and protection of the relation of trust and confidence between a client and his attorney.... A subpoena rule which does no more than recognize the attorney-client privilege, however, will ignore other important aspects of the relationship between a client and ... attorney.... Because information protected by the attorney-client privilege is not coterminous with information

> which an attorney acting ethically is supposed to hold confidential, there is much material in the hands of an attorney which remains exposed to the subpoena power, even if that power is limited by the privilege.

1988 Report with Recommendation, Report at 16-17 (footnote omitted).

Accordingly, the 1988 Policy urged that a prosecutor be required to establish, *inter alia,* that he or she had "unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information."[6]

A *per se* requirement that courts must enforce grand jury subpoenas against attorneys for client information has the potential to undermine the

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[6] Rule 3.8 of the ABA Model Rules of Professional Conduct states that a prosecutor shall not "subpoena a lawyer in a grand jury ... proceeding to present evidence about a past or present client unless the prosecutor reasonably believes" that the information is not protected by privilege, "is essential to the successful completion of an ongoing investigation or prosecution," and "there is no other feasible alternative to obtain the information." Further, the Department of Justice guidelines, as set forth in Section 9-3.410 of the United States Attorney's Manual (2009 ed.), apparently take a similar position, stating that prosecutors are required to "strike a balance between an individual's right to the effective assistance of counsel in the public's interest and the fair administration of justice and effective law enforcement," and should make "all reasonable attempts ... to obtain the information from alternative sources before issuing a subpoena to the attorney," although ultimately giving discretion for actions to the Assistant Attorney General of the Criminal Division. *Id.*

attorney-client relationship. This is because a client under grand jury investigation will know that, without inquiry, including whether the government has other available means for obtaining the information, the lawyer may be compelled to produce to the government information that was disclosed to the lawyer through the attorney-client relationship.

The ABA believes, further, that the current three-way circuit split potentially is even more damaging to the attorney-client relationship than the Ninth Circuit's *per se* rule, because the result is that the enforcement of a grand jury subpoena against an attorney may depend on the jurisdiction in which the subpoena is issued. Because the Petition presents the Court with an opportunity to establish uniform rules for the federal courts, the ABA urges that it be granted.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — RECOMMENDATION OF THE AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES, DATED FEBRUARY 1988

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That where a prosecutor seeks to compel an attorney to provide evidence obtained as a result of the attorney-client relationship concerning a person who is or was represented by the attorney, the prosecutor shall not subpoena nor cause a subpoena to be issued to the attorney without prior judicial approval after an opportunity for an adversarial proceeding; and

BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court finds, on reasonable notice to the attorney and the client:

1. the information sought is not protected from disclosure by any applicable privilege;

2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative or speculative;

3. the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter and a reasonably limited period of time and gives reasonable and timely notice;

4. the purpose of the subpoena is not to harass the attorney or his or her client; and

5. the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information.

BE IT FURTHER RESOLVED, That at the hearing, the prosecutor seeking to subpoena information as defined above, must submit to the appropriate court an affidavit making a particularized showing of the facts establishing all of the requirements specified above. The affidavit shall be disclosed to the attorney and the client. However, upon a special showing of compelling need, the affidavit may be maintained as an *ex parte* affidavit until such time as the need for secrecy is no longer compelling; and

BE IT FURTHER RESOLVED, That any hearing seeking judicial approval for a grand jury subpoena shall be conducted with consideration for the need for secrecy; and

BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

Appendix

REPORT

A.

NEED FOR THE RESOLUTION

The resolution is needed because of the increasing incidence of grand jury and trial subpoenas directed toward attorneys defending criminal cases and because the A.B.A. February 1986 resolution has proved inadequate to address this serious problem.

1. *Introduction*

In February 1986, the A.B.A. House of Delegates overwhelmingly approved a resolution requiring prior judicial approval of all subpoenas sought to be issued to attorneys for information relating to clients, and incorporation of several substantive standards to govern when such approval should be granted. This resolution was prompted by the A.B.A.'s concern over the increasing incidence of subpoenas directed to attorneys for information relating to clients, and by the effect this increasing tide of subpoenas might have on the very fabric of the adversary system and the attorney-client relationship -- the trust placed by clients in their attorneys and the confidentiality implicit in that relationship itself. The hope was that by focusing attention on this problem, and by suggesting procedures and standards to govern the issuance of subpoenas to attorneys, the tide might be stemmed before it causes any irreversible damage to the atmosphere of trust that must exist if the attorney is to

effectively perform his or her function in our system of justice.

Unfortunately, despite that resolution, the problem has grown substantially worse. In the 7 months preceding the existing resolution, according to Department of Justice statistics, approximately 170 federal grand jury subpoenas were issued to attorneys for information about a client – an average of about one each working day (24 per month).[1] In the 13 months immediately after the existing resolution was approved (March 1, 1986-March 31, 1987), approximately *525* federal grand jury and trial subpoenas were issued to attorneys for information about a client -- an average of almost two per working day (40 per month).[2]

This increasing incidence of attorney subpoenas, despite the February 1986 resolution, coupled with the sense that subpoenas to attorneys were becoming an increasingly attractive investigative method, led the Grand Jury Committee to reexamine the problem and the existing resolution. As a result, it was concluded that the existing resolution was inadequate in several key areas. Since a number of jurisdictions have already, or are in

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1. Letter from William Landers, Special Counsel to the Assistant Attorney General, Criminal Division, to the A.B.A., May 19, 1986.

2. Information provided by the Justice Department on November 14, 1986 at the National Network on the Right to Counsel Conference, New York University Law School, as supplemented by the May 11, 1987 Memorandum of the Director of Policy and Management Analysis of the Department of Justice's Criminal Division.

the process of, adopting standards based upon the A.B.A. model,[3] amending the 1986 resolution to strengthen its protections is essential if the tide of attorney subpoenas is to be controlled.

As the discussion below will set forth in greater detail, the new resolution modifies and strengthens the existing resolution in a number of respects, both procedurally and substantively. Three of these changes, however, are critically important.

First, the procedure set forth in the existing resolution calls for an *ex parte* hearing at which the prosecution seeks the permission of the court, under specified standards, to issue a subpoena to an attorney for information relating to a client. Under this procedure, however, there is no check on the overzealous advocate who either intentionally or unwittingly overstates the factual basis for the request.

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3. On October 1, 1985, the Supreme Judicial Court of Massachusetts adopted a proposed rule (Supreme Judicial Court Rule 3:08) which makes it unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney-witness to provide evidence concerning a person who is represented by the attorney-witness. The United States Attorney in Massachusetts sought to overturn that rule on the grounds that it violated the supremacy clause of the United States Constitution. The District Court upheld the ethical rule and the case is currently on appeal. *United States v. Klubock*, No. 85-4809-2 (D. Mass. 2/28/86), *aff'd*, 86-1413 (1st Cir. 1987), petition for rehearing *en banc* granted. *See also* Tennessee Supreme Court Rule 8. Bar associations in New York, Illinois and elsewhere have asked their highest courts to adopt similar ethical rules.

Moreover, permitting the prosecutor to argue the merits of the justification for a subpoena without the opportunity for the attorney sought to be subpoenaed to be present, to hear the facts presented and to make argument, tends to lead the reviewing court to become a "rubber stamp" for the prosecutor on whom the court must solely rely. And, of course, the fact that the judge has already approved the issuance of the subpoena at the *ex parte* proceeding puts the attorney at the distinct practical disadvantage when a post-issuance motion to quash is litigated, even if the *ex parte* proceeding has no binding precedential effect.

In light of these problems, the current resolution contemplates, in essence, moving the post-issuance motion to quash to the pre-issuance stage by requiring an *in camera* adversarial proceeding prior to judicial approval for the subpoena being granted. While the precise nature of the "adversarial proceeding" is left to the individual jurisdiction to define, it is intended that the issues normally resolved at the motion to quash would be resolved at the pre-issuance stage. Thus, it is only the timing of the adversarial proceeding that is affected, and no additional hearing is required by the resolution. Nevertheless, requiring that the pre-issuance hearing be an adversarial proceeding will lead to a more thorough and meaningful application of the substantive standards proposed.

It is with regard to these substantive standards that the second and third critical changes are proposed. Under the current resolution, before judicial approval may be granted the court must find only that the evidence sought

by the subpoena is relevant to the investigation being conducted and that there is no other feasible alternative. However in balancing when the need to subpoena an attorney outweighs the destructive impact this practice has on attorney-client relationships (both in general and in the specific case), there should be some showing that the evidence sought is not merely peripheral or cumulative of speculative -- that it is truly important enough to justify the damage done by the subpoena itself. Moreover, the attorney should only be subpoenaed when all reasonable attempts to obtain the information from alternative sources have actually proven to be unsuccessful -- that the subpoena to an attorney is only used as a last resort. Indeed, both of these concepts are included in the Department of Justice's own guidelines on attorney subpoenas.[4]

The current resolution addresses these important factors in the balancing process by requiring a showing that the information sought by the subpoena be essential to the successful completion of the investigation or prosecution and the prosecutor have actually attempted to obtain the information for all non-attorney sources before the attorney subpoena may be approved. These critical requirements insure that attorney subpoenas will be issued only as a last resort and only where the information sought is truly required for the fair administration of justice. Absent these circumstances, the impact of attorney subpoenas on the attorney-client relationship and the adversary system itself is simply too great to warrant their use, particularly in the numbers present today.

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4. U.S. Attorney's Manual, 9-2.161 (July 18, 1985).

Appendix

2. *Discussion*

Statistics released by the Department of Justice indicate that from July 1985 through March 1987 almost 700 attorney subpoenas have been authorized by the Department. This number, of course, does not include attorney subpoenas issued by state prosecutors. The devastating impact of these attorney subpoenas is familiar to everyone who has inflicted, endured, or witnessed them: they divert attention from the merits of the case and generate complicated controversies about tangential issues; they sap the morale of the opposing advocate by focusing attention on his own conduct or by forcing him to defend his own interest; and they channel precious time, energy, and resources into diversionary skirmishes which inevitably weaken the opposition's taste and strength for the main fight. A devise common to both civil and criminal litigation is the motion to disqualify one's opponent. In addition, those involved in the defense of criminal cases now confront, with increasing frequency, grand jury and trial subpoenas aimed directly at them. The resolution before the House of Delegates addresses this problem by requiring prior judicial approval of such subpoenas, by specifying the matters which must be considered in granting such approval and by providing that the court evaluating the propriety of the subpoena do so in the context of an adversarial hearing.

One nationally respected bar association which studied the problem for two years concluded that the unnecessary and overbroad use of subpoenas served upon defense attorneys by prosecutors "threatens both the integrity of

the criminal justice system and the ability of large classes of defendants to obtain representation."[5] The bar group further observed that the impact of the ever-increasing flow of subpoenas has created a furor unmatched in recent decades. Across the United States, lawyers, judges and legal scholars have recognized the serious impact which such subpoenas are having on existing and potential attorney-client relationships. Indeed, the "excessive use of subpoena power poses . . . one of the single greatest threats to the defense bar and to defendants' ability to obtain criminal representation."[6]

The increasing incidence of subpoenas issued to criminal defense lawyers was first documented by Professor William J. Genego of the University of Southern California Law Center. Commencing in May and June of 1985 Professor Genego sent 4,024 questionnaires to all members of the National Association of Criminal Defense Lawyers, of which 3,950 were actually delivered. He received 1,648 responses, a response rate of 42%.[7] The first

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5. Report, "The Issuance of Subpoenas Upon Lawyers In Criminal Cases By State and Federal Prosecutors: A Call For Immediate Remedial Action," Committee on Criminal Advocacy of the Bar Association of the City of New York (July, 1985), p. 1.

6. *Id.* This Report urges the nationwide adoption of a prior judicial approval requirement for attorney subpoenas that is even more rigorous than this resolution.

7. W. Genego, "Reports From the Field: Prosecutorial Practices Comprising Effective Criminal Defense," *Champion*, May, 1986, pp. 7-18; W. Genego, "Risky Business: The Hazard of Being A Criminal Defense Lawyer," *Criminal Justice*, Spring,

conclusion to be drawn from the study is that subpoenas are being issued to attorneys with alarmingly increasing frequency. Of the attorneys responding, 18% said they had received grand jury subpoenas at some point, and 68% of those had received them between 1983 and 1985. Only 15% had received them before 1980, while 18% received them between 1980 and 1982. The study also revealed that the subpoenas rain most heavily upon the more experienced advocates. Of those who had practiced more than ten years, 26% said they had received grand jury subpoenas. Of those who had practiced six to ten years, 12% had received them. Of those who were in practice three to five years, 9% had received them, while only 3% of those in practice less than three years had received them.

The increasing frequency with which defense attorneys are receiving grand jury or trial subpoenas calling for information about clients coincides, unsurprisingly, with the enactment and implementation of two federal statutory schemes, as to which the House of Delegates has already taken a position. The first set of statutes consists of the Comprehensive Crime Control Act's amendments to the federal RICO and Continuing Criminal Enterprise ("CCE") statutes, effective October 12, 1984, providing that the government's title to forfeitable property vests "upon the commission of the act giving rise to forfeiture" under the RICO[8] OR CCC[9] statute. The second set of

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1986, pp. 2-42.

8. 18 U.S.C. 1963(c) (1985).

9. 21 U.S.C. 853(c) (1985).

statutes consists of the amendments to section 6050I of the Internal Revenue Code, effective January 1, 1985, requiring all persons "engaged in a trade or business" to file a report with the Internal Revenue Service.

The forfeiture provisions of the Comprehensive Crime Control Act of 1984 spawned a spate of litigation as the federal government issued trial and grand jury subpoenas to attorneys actively involved in the defense of the very cases which forfeiture was sought. In a number of cases,[10] the government, after indictment, issued a trial or grand jury subpoena to the defense attorney, calling for information concerning the size and source of the attorney's fees. This information was to be used at trial as evidence of "substantial income," an element of the CCE charge, and as evidence relevant to the special verdict of forfeiture sought by the government. Issuance of the subpoenas was a critical part of the government's attempt to obtain forfeiture of fees paid the attorney for defense of the case. Grave concern over the practice of seeking a judgment forfeiting attorney fees led the House of Delegates on July 9, 1985 to enact a resolution opposing the practice:

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10. *E.g.*, *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985) (CBM); *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Reckenmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985) (PNE); *In re Grand Jury Subpoena Duces Tecum Dated January 12, 1985* (*Paden v. United States*), No. M-11-188 (DNE) (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

> BE IT RESOLVED, That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect illegal activity of a client.

Concern parallel to that generated by the practice of seeking forfeiture of attorney fees was generated by the amendments to section 6050I of the Internal Revenue Code, which took effect on January 1, 1985. Those amendments require that lawyers, as persons "engaged in a trade or business," file a report with the Internal Revenue Service listing, among other things, the amount of currency received and the name and Social Security number of the person making payment, in those situations when the transaction (or related transactions) involves more than $10,000 in cash. Fearing that the cash reporting requirement could intrude on the relationship between an attorney and client, the House of Delegates in February 1985 passed the following resolution:

> BE IT RESOLVED, That the American Bar Association expresses deepest concern over the effect upon the attorney-client privilege and upon the confidentiality of the attorney-client relationship of Section 6050I of the Internal Revenue Code, added by Section 146 of Title

I of the Deficit Reduction Act of 1984, which requires disclosure of cash receipts in excess of $10,000;

BE IT FURTHER RESOLVED, That the American Bar Association urges the Department of Treasury to delay issuance of regulations implementing Section 6050I with respect to receipt by lawyers of cash fees or expenses for legal services until an appropriate solution to this problem can be devised.

One year later, and in the wake of many more subpoenas having been issued to attorneys, in February 1986, the House of Delegates passed the following resolution:

BE IT RESOLVED, That a prosecuting attorney shall not subpoena nor cause a subpoena to be issued to an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness; and

BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court, in an *ex parte* hearing, finds:

1. the information sought is not protected from disclosure by the attorney-client privilege

or the work product doctrine;

2. the evidence sought is relevant to an investigation within the jurisdiction of the grand jury;

3. the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and

4. there is no other feasible alternative to obtain the information sought.

BE IT FURTHER RESOLVED, That the *ex parte* hearing seeking judicial approval shall be conducted with consideration for the need for the secrecy of grand jury proceedings. The hearing shall be conducted by a judge of a court of general criminal jurisdiction, and, wherever feasible, by the judge supervising the grand jury in question; and

BE IT FURTHER RESOLVED, That no affirmative finding in the *ex parte* proceeding shall have any evidentiary value in any subsequent adversary proceeding to determine the validity or enforcement of the subpoena; and

BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

Appendix

It had been widely hoped that the A.B.A.'s February 1986 resolution, coupled with the powerful policy arguments and the national outcry against the proliferating practice, would stem the tide of unwarranted subpoenas to lawyers. Regrettable, quite the contrary has proven true. Statistics obtained by the A.B.A. establish that at the same time the government had adopted its own subpoena guidelines and while the A.B.A.'s February 1986 resolution has been in effect, the number of subpoenas has increased dramatically.

Moreover, attorneys across the country have found that some prosecutors have not obtained Department of Justice approval for their attorney subpoenas, and thus these statistics seem to understate the problem. Similarly, because federal prosecutors obtain approval for their subpoenas from their own colleagues in a non-adversarial setting without the necessity of submitting sworn allegations of facts, the factual showings made to the Department itself may in some cases be inaccurate or overstated.

The premise of the February, 1986 resolution was identical to that of the House's resolution on forfeiture of attorney fees and its resolution on the impact of the cash reporting requirements. The unregulated and unfettered discretion to subpoena an attorney, like a judgment of forfeiture or a requirement that the attorney report certain information about a client to the IRS, intrudes abruptly on the entire relationship which an attorney must have with his client if the adversary system is to function as it should.

Appendix

Proper operation of our adversary system of justice requires full recognition and protection of the relation of trust and confidence between a client and his attorney. One, but only one, aspect of that relation is the privilege not to disclose confidential communications between the client and the attorney, the oldest privilege for confidential communications known to the common law.[11] The United States Supreme Court has observed that "the purpose of the privilege is to encourage clients to make full disclosure to their attorneys."[12] The full and frank communication encouraged by the privilege promotes "broader interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer's being fully informed by the client."[13] Any rule regulating subpoenas to lawyers must, at a minimum, provide for full protection of the privilege.

A subpoena rule which does no more than recognize the attorney-client privilege, however, will ignore other important aspects of the relationship between a client and his attorney. In those jurisdictions which have adopted the Model Code of Professional Responsibility, a lawyer is ethically required under DR 4-101 to keep a client's "confidences and secrets," the latter term being defined

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11. *Klitzman v. Krut*, 744 F.2d 955, 960 (3d Cir. 1984); C. McCormick, Law of Evidence 87, at 175 (2d ed. 1972).

12. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

13. *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981).

as "information gained in the professional relationship which the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[14] Rule 1.6 of the Model Rules of Professional Conduct likewise defines a lawyer's obligation of confidentiality to encompass matters beyond the attorney-client privilege.

Because information protected by the attorney-client privilege is not coterminous with information which an attorney acting ethically is supposed to hold confidential, there is much material in the hands of an attorney which remains exposed to the subpoena power, even if that power is limited by the privilege. For example, the prevailing judicial position is that, absent special circumstances, and attorney may be compelled by subpoena to reveal information about the identity of the client and the size and source of his fee.[15] As one court has explained:

> This result follows from defining the privilege to encompass only those confidential communications necessary to obtain informed legal advice. This definition, which focuses upon facilitating the role of the lawyer as a professional advisor and advocate, is to be

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14. Model Code of Professional Responsibility DR 4-101 (A) (1979).

15. *E.g.*, *United States v. Doe*, 722 F.2d 303 (6th Cir. 1983); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1065, 1069, dismissed as moot, 697 F.2d 112 (4th Cir. 1982) (defendant became a fugitive).

> distinguished from the so-called "incrimination rationale," which focuses on whether the material sought may be used as evidence against the client.[16]

Similarly, an attorney in possession of documents received from a client in the course of a case may be compelled by subpoena to produce those documents, assuming that the client himself could be compelled to produce the documents were they in the client's hands.[17]

Because a subpoena may compel production of information which, though unprivileged, is certainly confidential in the sense that a client has requested that it be so held or that its disclosure would be embarrassing or detrimental to a client (see DR 4-101), the mere issuance of the subpoena undermines the client's confidence and trust. Nearly a decade ago, Judge Becker of the Eastern District of Pennsylvania observed:

> [W]e are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client. . . . The dangers and disadvantages of the practice have been demonstrated in [various] cases. . . . The practice permits the government by unilateral action to create the possibility of a conflict of interest between

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16. *In re Grand Jury Subpoena Served Upon Shargel*, 742 F.2d 61, 62-63 (2d Cir. 1984).

17. 8 J. Wigmore, Evidence, 2307 (McNaughton Rev. 1961); *Fisher v. United States*, 425 U.S. 391 (1976).

> the attorney and client, which may lead to a suspect's being denied his choice of counsel by disqualification. The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests and thus impair or at least impinge upon the attorney-client relationship.[18]

Other courts have recognized the problem in similar terms:

> [W]hen a subpoena is issued against an attorney in an ongoing attorney-client relationship, the attorney may well be placed in the position of becoming a witness against his client or risking contempt. [T]here is the strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed. . . .
>
> If the attorney complies with the subpoena and appears before the grand jury behind closed doors, a substantial chilling effect on truthful communications from the client to the attorney thereafter would be likely, especially if the client is indicted.[19]

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18. *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 945-946 (E.D. Pa. 1976).

19. *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1009 n. 4 (4th Cir. 1982).

Finally, the ABA, in its Grand Jury Policy and Model Act noted:

> Abuse of grand jury subpoenas used against persons having recognized confidential relationships appears to be increasing; this can drive a wedge of distrust between defense attorney and client, and has a chilling effect on Sixth Amendment rights and confidential relationships.[20]

As the foregoing cases and authorities recognize, the trust and confidence which is the foundation of the attorney-client relationship do not rest solely on the expectation that communications between client and attorney will remain undisclosed. Clients seeking counsel in civil lawsuits and criminal proceedings do not draw fine distinctions or follow the nuances of the privilege and its exceptions. Confronted by a hostile, powerful adversary and by an intricate and bewildering array of procedures, with their liberty and property at stake, they rightfully expect a lawyer who, within the constraints of the law and the profession's code of ethics, will zealously argue their case at every turn. There could be few things more destructive of this expectation that the spectacle of their own attorney forced by their adversary to supply information detrimental to their interest.

The unregulated power to subpoena attorneys also carries with it the potential for mischief inherent in any situation where one adversary can pummel his opponent

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20. Grand Jury Policy and Model Act, Prin. No. 23 commentary at 11 (1977).

without violating the rules. The United States District Court for the District of New Hampshire recently articulated the traumatic impact of such subpoenas on defense attorneys as follows:

> The actions of United States Attorney are without doubt harassing, show minuscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law. . . . The use of the phrase chilling effect upon the role of an attorney engaged in criminal defense work by being served a subpoena in circumstances such as this is mild. To permit it would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice flows, bereft of the succor of constitutional safeguard.
>
> Also to be considered is the ever increasing specter of malpractice suits, the possible vindictiveness of prosecution counsel towards a successful, recalcitrant, obnoxious or obfuscating adversary, the jeopardizing of the attorney-client, real or imaginary, the reluctance of capable attorneys to continue or to consider a full or partial career in the practice of criminal law and the further depletion in the paucity of capable trial lawyers because of a concatenation of events leading to abuse of process.[21]

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21. *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D. N.H. 1984), *aff'd sub nom. United States v. Hodes*, 751 F.2d 13 (1st Cir. 1985).

Appendix

That Judge Loughlin's fears are real is demonstrated by one of the most startling findings of Professor Genego's study, cited earlier herein: of those members of the National Association of Criminal Defense Lawyers responding to his study, 14% said they would no longer take a case due to their apprehension of receiving a subpoena compelling information from them.

B.

EXPLANATION OF THE RESOLUTION

The resolution before the House seeks an accommodation between: (1) the public's interest in maintaining a grand jury with broad investigative power and the right to every man's evidence; and (2) the public's interest in full protection of the attorney-client relationship from the threat posed by subpoenas directed to attorneys. The threat to the attorney-client relationship is addressed in several ways. First, the subpoena cannot be issued without prior approval of a judge. This requirement insures that the decision to permit the subpoena will be made by one whose purpose in the system is to be neutral, rather than by the subpoenaed attorney's adversary. Further, judicial approval of the subpoena is preferable to prosecutorial guidelines for its issuance because of the line of authorities holding that an agency's violation of its own guidelines affords the aggrieved person no remedy of any sort.[22]

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22. *United States v. Cacares*, 440 U.S. 741 (1979).

Appendix

1. *Scope of the Resolution*

As noted above, the new resolution before the House modifies the initial A.B.A. February 1986 resolution in a number of important respects. First, the 1986 resolution was limited to subpoenas concerning current clients, while the new resolution governs the issuance of attorney subpoenas to prior clients as well. Because the issuance of an attorney subpoena may itself result in that attorney being disqualified or chill the attorney-client relationship to the point where the client terminates the relationship, the scope of the A.B.A. February 1986 resolution has been broadened to cover both ongoing and prior attorney-client relationships. This view is also consistent with ethical guidelines which require that an attorney maintain the secrets and confidences of a present or past client.[23]

2. *Procedural Provisions*

Second, the resolution differs from the February 1986 A.B.A. resolution by providing notice and hearing procedures to insure more than mere lip service compliance often associated with *ex parte* procedures. The resolution provides that the subpoena may not be issued without prior judicial approval after an opportunity for an *in camera* adversarial proceeding. The need for the procedural safeguards to be implemented by means of an adversarial hearing are obvious. By permitting

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23. *See A.B.A. Model Code of Professional Responsibility*, Ethical Considerations 4-1, 4-6; *A.B.A. Model Rules of Professional Conduct*, Rule 1-6 (Comment 22), 1.9.

the prosecutor to argue the merits of the justification for a subpoena without the opportunity for counsel for the subpoenaed attorney to be present, hear facts and make argument, the reviewing court may simply become a "rubber stamp." Moreover, the absence of opposing counsel permits the presentation of facts which may be overstated or unsupported. Hence, a procedure which permits counsel for the subpoenaed attorney to participate at an adversarial hearing maximizes the likelihood that the reviewing court's decision as to the propriety of the subpoena will be based upon a reasonable foundation of fact.

In addition, the new resolution requires that at the hearing to establish the propriety for the subpoena, the issuing attorney must submit an affidavit to the appropriate court, making a particularized showing of the facts establishing all of the requirements set forth in the resolution. This procedure which is analogous to the "Schofield Affidavit" which has been required in the Third Circuit for some grand jury subpoenas for a number of years,[24] will insure that the burden of going forward with specific facts to justify the subpoena sought will rest squarely on the party seeking the subpoena, and will crystalize the factual issues to be determined by the court. It will also tend to minimize the risk that the party seeking a subpoena might overstate the factual basis for the request.

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24. *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 965 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F. 2d 85, 93 (3d Cir. 1973).

However, because the prosecution or issuing attorney may be able to establish that there is a special secrecy problem, the issuing attorney may request, based upon a showing of compelling need, that his affidavit be maintained as an *ex parte* affidavit until such time as the need for secrecy is no longer compelling. This provision of the new resolution seeks to accommodate both the need of the prosecution, in limited circumstances, for the guarantee of no disclosure as well as the needs of the subpoenaed attorney to avoid such claims being made routinely and without a basis in fact.[25]

3. *Substantive Standards*

As to the five categories of fact that the prosecutor seeking to issue the attorney subpoena must establish, the new resolution makes some significant improvements to the February 1986 resolution, based in large part on the Guidelines adopted by the Department of Justice which govern the issuance of attorney subpoenas.[26] The first provision, requiring that the information sought not be privileged, tracks substantive law, as well as the Department of Justice Guidelines.[27] While in theory

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25. *Cf. In re Search Warrant for Second Floor Apartment*, 489 F. Supp. 207, C.O.R.I. (1980) (Government's talismatic invocation of need for secrecy in the context of the grand jury should not be routinely accepted -- to do so would reduce the court to a "rubber stamp.").

26. *D.O.J. Subpoenas Guidelines, United States Attorney's Manual*, 9-2.160, *et seq.* (July 1985).

27. *D.O.J. Subpoenas Guidelines*, 9-2.161 (F) (6).

somewhat broader than the language of the February 1986 resolution, which only required that the information sought not be protected "by the attorney-client privilege on the work product doctrine," it is difficult to imagine a situation in which some other recognized privilege would apply to an attorney subpoena. If such a situation arises, however, there is no reason not to recognize the protection of the privilege in determining whether the subpoena should be issued.

The second provision, requiring the information sought be essential to the successful completion of an ongoing investigation or prosecution and not be merely peripheral, cumulative or speculative, strengthens the language in the February 1986 A.B.A. resolution which provided only that the evidence be "relevant." Virtually any evidence can be found to be relevant in some way to a broad grand jury investigation. Moreover, if the evidence had no relevancy to the prosecutor he or she presumably would not be seeking to obtain it from the attorney in the first place. The relevancy standard is therefore simply too low a threshold of need in light of the devastating impact attorney subpoenas have. Indeed, even the Department of Justice has recognized that information should be subpoenaed from attorneys only when "there [is] reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information."[28]

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28. *D.O.J. Subpoenas Guidelines*, 9-2.16 (F) (1).

Thus, the only difference between the new resolution and guidelines adopted by the Department of Justice is the resolution's requirement that the information be "essential" to the successful completion of the investigation rather than "reasonably needed." As a practical matter this may be a distinction without a difference, since evidence that is in fact reasonably needed to successfully complete an investigation is also probably essential to that end. To the extent they are different, however, the significant threat to attorney-client relationships posed by subpoenas fully justifies that they not be issued unless the information sought is essential. If it is not, the cost of such a subpoena to the attorney-client relationship far outweighs the need for a subpoena.

The third provision, requiring that the subpoena list the information sought with particularity and be a reasonably limited period of time and give reasonable notice, tracks substantive law on drafting of subpoenas and language in the Department of Justice Guidelines.[29]

The fourth provision, requiring that the subpoenas not be used to "harass" the attorney, is similar to the A.B.A. February 1986 resolution.[30]

The fifth provision, requiring that the attorney seeking to issue the subpoena has unsuccessfully

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29. *See D.O.J. Subpoenas Guidelines*, 9-2.161 (F) (5).

30. *Cf. In re Grand Jury Matters*, 593 F. Supp. 103 (D. N.H. 1984), *aff'd sub nom. United States v. Hodes*, 751 F.2d 13 (1st Cir. 1985).

made all reasonable attempts to obtain the information sought from non-attorney sources and there is no other feasible alternative to obtain the information, tracks the Department of Justice Guidelines, with some exception.[31] The Department of Justice Guidelines require that subpoenas be served only where all reasonable attempts have been made to obtain the information from alternate sources unless such efforts would compromise a criminal investigation or prosecution or would impair the ability to obtain such information from any attorney if such attempt proves unsuccessful.[32] The new resolution requires that the lawyer seeking to issue the subpoenas attempt to obtain the information from *all* non-attorney sources and certify that there is no other feasible alternative to obtain the information. While the issue is not susceptible to hard empirical analysis, any lesser standard simply has proven inadequate. Under the lesser standards of both the February 1986 A.B.A. resolution and the D.O.J. Guidelines, attorney subpoenas have increased steadily and have caused serious deteriorations in attorney-client relations. In light of the enormously harmful impact that attorney subpoenas have on the attorney-client relationship, exhaustion of all alternatives is necessary. Simply put, subpoenaing an attorney for information concerning a client should only be done as a last resort, when all else has failed.

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31. *See D.O.J. Subpoenas Guidelines*, 9-2.161 (B).

32. *Id. See also United States v. Rogers*, No. 84-Cr. 337 (D.C. Colo. 5/21/86) (39 *Crim. L. Rptr.* 2201) (if he government is capable of proving by other means, it may not call the client's counsel, or the law firm's bookkeepers, as witnesses).

4. *Conclusion*

The notion of giving the attorney-client relationship every protection possible in the face of attorney subpoenas, reflects Principle Number 29 of the A.B.A.'s Grand Jury Policy and Model Act which unequivocably states: "No attorney . . . shall be questioned in the grand jury concerning matters he has learned in the legitimate . . . representation of his client's case. . . ." Stated another way, this resolution accords the attorney-client relationship special protection by according attorneys as a class exemption from subpoenas except in the absence of extraordinary circumstances, much in the same way that members of the press are accorded special protections from governmental subpoenas. Surely, if federal guidelines such as 28 C.F.R. § 50.10 accord special protections to reporters requiring the government to seek alternate sources of information before a subpoena is served, no less protections should be accorded to attorneys, who play as important a role in the constitutional fabric of our society.[33]

Respectfully submitted,

John M. Greacen
Chairperson
Criminal Justice Section

February 1988

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33. It is important to note, however, that it is not intended that the protections afforded by the resolution apply where the prosecutor makes a reasonable showing to the court that the attorney to be subpoenaed was involved in the criminal activity concerning which the information sought relates. It is the legitimate attorney and the legitimate attorney-client relationship, that is sought to be protected.